IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

MICHAEL PENNEL, JR., ,

Plaintiff/Movant,

vs.

NATIONAL FOOTBALL LEAGUE PLAYERS ASSOCIATION, et al.,

Defendants/Respondents.

CASE NO.: 5:16-CV-02889

JUDGE JOHN R. ADAMS

DEFENDANT NATIONAL FOOTBALL LEAGUE PLAYERS ASSOCIATION'S POSITION STATEMENT [CORRECTED]

We write on behalf of Defendant National Football League Players Association ("NFLPA") in response to Your Honor's November 29, 2016 Order that Defendants submit a position statement prior to today's conference call.

The NFLPA opposes Plaintiff's request for injunctive relief, but does not oppose an expedited hearing on Plaintiff's motion for temporary restraining order ("Motion"). Plaintiff left the NFLPA a voicemail minutes before filing the Motion; the NFLPA was sent the Complaint and Motion around 3 p.m. yesterday afternoon. Plaintiff has not and cannot meet its heavy burden to prove the requirements for the Court to issue an injunction—an extraordinary remedy that would *not* maintain the status quo, but instead alter it and interfere with the NFL and NFLPA's collectively bargained labor arbitration process. Nor has Plaintiff proved—much less identified—any injury flowing from the alleged absence of a Notice Arbitrator or a third neutral arbitrator.

The Policy

Plaintiff concedes that he is bound by the NFL-NFLPA Collective Bargaining Agreement ("CBA"), and in turn, by the collectively bargained Policy and Program on Substances of Abuse ("Policy"). Mot. at 1-2. The Policy requires a player to submit his disciplinary appeal to an arbitrator "jointly select[ed]" by "the Parties." Compl. Ex. A, § 4.1 at 22. Depending on the day, the arbitrator is either James Carter[1] or Glenn Wong[2], two highly respected and experienced neutrals jointly selected by the NFL and the NFLPA. Mr. Wong serves as the Notice Arbitrator. The parties to the CBA—the NFL and the NFLPA—mutually consented to modify their agreement and not appoint a third arbitrator because there are simply not enough appeal hearings under the Policy to justify having three arbitrators in rotation; this has been the status for a significant period of time.

The Policy provides that "[a]ppeal hearings will be scheduled to take place on the fourth Tuesday following issuance of the notice of discipline," which in Plaintiff's case, is Tuesday, December 6. Compl. ¶¶ 21-24; Policy, § 4.2 at 23. Around May 2016, the regular season schedule was set, and Arbitrator Carter was assigned to cover Tuesday, December 6 (generally speaking, Arbitrators Carter and Wong alternate covering Tuesdays during the NFL season). Thus, when Plaintiff's notice of discipline was issued on November 8 (Compl. ¶ 22), Plaintiff's appeal was automatically scheduled for December 6 (*id.* ¶ 24), a date previously assigned to Arbitrator Carter.

All disputes under the Policy—disciplinary appeals and otherwise—are subject to arbitration. Section 4.2 provides:

> **Other Appeals**. Any Player who has a grievance over any aspect of the Policy other than discipline . . . must present such grievance to the NFLPA . . . within

[1] https://www.wilmerhale.com/james_carter/.
[2] http://glennwongsportslaw.com/index.html.

> five (5) business days of when he knew or should have known of the grievance. The NFLPA will endeavor to resolve the grievance in consultation with the [NFL] Management Council. Thereafter, the NFLPA may, if it determines the circumstances warrant, present such grievance to: (i) the designated third party arbitrator selected pursuant to Section 4 of this Policy for final resolution for any disciplinary action; or (ii) the Commissioner for any other matter. Such grievance must be presented no later than thirty (30) calendar days after the Player's presentment of the grievance to the NFLPA.

Id. at 25. Plaintiff never presented any such grievance to the NFLPA about the purported lack of a Notice Arbitrator or about the purported non-compliance with the Policy provision about appointing "no fewer than three but no more than five arbitrators[.]" Policy, § 4.1 at 22. Plaintiff chose to file this lawsuit instead.

"Pending completion of the appeal, the suspension or other discipline will not take effect." Policy, § 4.2 at 23. Accordingly, Plaintiff is not presently suspended or otherwise disciplined; he is employed by the Green Bay Packers and the terms of his employment are not impacted in any manner while his appeal is pending.

The NFLPA's Positions

An injunction is an "extraordinary remedy involving the exercise of a very far-reaching power, which is to be applied only in the limited circumstances which clearly demand it." *Leary v. Daeschner*, 228 F.3d 729, 739 (6th Cir. 2000) (internal citation and quotations omitted). As an "extraordinary remedy," it "is issued cautiously and sparingly." *Hausser + Taylor LLC v. RSM McGladrey, Inc.*, No. 1:07 CV 2832, 2007 WL 2778659, at *2 (N.D. Ohio Sept. 21 2007) *citing Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312-13 (1982). Plaintiff must demonstrate its entitlement to injunctive relief by clear and convincing evidence. *Honeywell, Inc. v. Brewer-Garrett Co.*, 145 F.3d 1331, 1998 WL 152951, at *3 (6th Cir. Mar. 23, 1998). The proof required for a moving party to obtain a preliminary injunction is "much more stringent than the proof required to survive a summary judgment motion." *Leary*, 228 F.3d at 739.

Plaintiff has no likelihood of success. Plaintiff makes no showing that anything about the forthcoming arbitration is fundamentally unfair, that the arbitrator is evidently partial, or that there is any prejudice. To the contrary, a jointly-appointed, highly-experienced, third-party arbitrator is available to hear Plaintiff's appeal on the date specified by the Policy (*i.e.*, the fourth Tuesday following the notice of discipline). *See* Policy, § 4.2 at 23. The remedy he seeks violates the CBA, violates labor policy, and is a *non sequitur*. The Complaint should be dismissed.

The requested relief would violate the CBA, which specifically provides for the *NFL and NFLPA* to jointly appoint arbitrators. Respectfully, the Court should not intrude upon the NFLPA's—and the NFL's—bargained-for right to jointly appoint neutrals with "appropriate expertise in matters under th[e] Policy." Policy, § 4.1 at 22. Plaintiff's authorities concerning the federal policy favoring arbitration arguments actually undermine his request here, because Plaintiff asks the Court to rewrite the arbitration agreement by having the Court (not the parties to the arbitration agreement) appoint a neutral, and by having the Court (not the Notice Arbitrator) determine which arbitrator will hear Plaintiff's appeal. Plaintiff acknowledges "[t]he weight of federal statutes and decisional law support only the conclusion that the public interest is best served by enforcing arbitration agreements *according to their terms*," Mot. at 8 (citing *AT&T Mobility v. Concepcion*, 563 U.S. 333, 344), but his requested remedy urges rewriting of the arbitration procedures.

Further, Plaintiff relies only on *In re Salomon Inc. Shareholders' Derivative Litig.*, 68 F.3d 554, 560 (2d Cir. 1995) (cited as *Gutfruend v. Weiner* by Plaintiff) to support his argument that there is a "lapse in the naming of an arbitrator or arbitrators" here that requires the Court's appointment of an arbitrator under FAA Section 5. *See* Mot. at 4. But in *Salomon*, the Second

Circuit *affirmed* the district court's *refusal* to appoint its own arbitrator because the district court correctly recognized it was bound to apply the arbitration provision as written. *Salomon* at 559-561. The Second Circuit further explained that "a lapse in the naming of the arbitrator occurs when the arbitrator selected by the parties cannot or will not perform." *Id.* at 560 (quoting *Astra Footwear Indus. v. Harwyn Int'l, Inc.*, 442 F. Supp. 907, 910 (S.D.N.Y.), *aff'd*, 578 F.2d 1366 (2d Cir. 1978). The Second Circuit provided examples of such lapses, such as deadlock in the naming of an arbitrator; a panel vacancy left by an arbitrator's death; a designated arbitrator's conflict of interest; and an arbitrator selection provision no longer in effect. *See id*. at 561 (collecting cases). None of these provides an apt analogy to Plaintiff's purported "lapse" here; a duly-appointed arbitrator under the Policy stands ready to proceed on the date dictated by the Policy.

In addition, Plaintiff has failed to exhaust his administrative remedies, further compelling dismissal. The Labor Management Relations Act, 29 U.S.C. § 185 ("LMRA"), governs labor arbitrations such as this one. Compl. ¶ 5. "Before initiating an action under section 301 of the Labor Management Relations Act, union members are required to attempt to settle the dispute through internal union procedures." *Anderson v. Ideal Basic Indus.*, 804 F.2d 950, 952 (6th Cir. 1986) (citing *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 652 (1965)); *see also Lovely v. Aubrey*, 188 F.3d 508 (6th Cir. 1999) ("An employee seeking remedy for an alleged breach of a labor contract must attempt to exhaust the grievance and arbitration procedures established by the collective bargaining agreement before seeking relief in federal court."). As the Supreme Court explained in *Republic Steel*:

> A contrary rule which would permit an individual employee to completely sidestep available grievance procedures in favor of a lawsuit has little to commend it. In addition to cutting across the interests already mentioned, it would deprive employer and union of the ability to establish a uniform and

> exclusive method for orderly settlement of employee grievances. If a grievance procedure cannot be made exclusive, it loses much of its desirability as a method of settlement. *A rule creating such a situation would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements.*

379 U.S. at 653 (emphasis added).

The "Other Appeals" provision quoted above required Plaintiff to timely present his complaints about the number and identity of arbitrators to the NFLPA—who then could have pursued further arbitration proceedings on Plaintiff's behalf. Policy, § 4.2 at 25. But Plaintiff failed to initiate any such grievance.

Relatedly, with respect to the pending arbitration concerning his potential discipline, Plaintiff seeks to stop the arbitration appeal process in its tracks. The normal course would be for Plaintiff to file a petition to vacate the arbitration decision *after* it is issued rather than asking a Court to intrude upon an ongoing labor arbitration proceeding. In multiple ways, therefore, Plaintiff asks this Court to prematurely and improperly invade the labor and arbitral processes for which the NFL and NFLPA bargained.[3]

Finally, Plaintiff's factual premise is wrong. There is a Notice Arbitrator—it is Arbitrator Wong. And there is no "requirement" under the Policy to have three arbitrators because the NFL and NFLPA mutually consented—as is their right—to modify their agreement. Policy, § 1.1.8 at 6.

Plaintiff Has Failed to Show Irreparable Harm. The NFLPA agrees with Plaintiff that *suspensions* preventing NFL players from working cause irreparable harm. But Plaintiff's Complaint does not concern his potential suspension—it challenges the purported lack of a third arbitrator and Notice Arbitrator. Even if those *were* "violations" of the Policy, Plaintiff has not

[3] Similarly, the NFLPA Constitution provides that "[n]o member of the NFLPA shall resort to any court or agency outside the NFLPA unless and until he has exhausted all forms of relief provided in this Constitution." *See* NFLPA Constitution, § 8.04.

identified *any* injury—much less irreparable injury—that flows from his complaints about the arbitrator roster.

Moreover, Plaintiff is not suspended now and will not be suspended until and unless Arbitrator Carter hears the appeal and issues an award affirming the discipline. As such, Plaintiff's claim of irreparable harm is not ripe and may never be.

An Injunction Would Harm Third Parties and the Public Interest. As described above, the requested relief undermines public policy concerning judicial deference to labor relations as well as to enforcing arbitration agreements according to their terms. *See Republic Steel Corp.*, 379 U.S. at 653; *AT&T Mobility*, 563 U.S. at 344.

Forum Non Conveniens. The NFL is located in New York, the CBA and the Policy are governed by New York law, the arbitration is scheduled to be heard in New York, the NFLPA is located in Washington, D.C., and the Plaintiff resides in Wisconsin. It is unclear what "work" or "business" Plaintiff performed in this District that has any relevance to this action. Compl. ¶¶ 9, 10. Rather, it appears Plaintiff's choice of venue is principally—if not exclusively—about the location of Plaintiff's law firm.

/s/ David Greenspan
David L. Greenspan (pro hac vice pending)
Jonathan Amoona (pro hac vice pending)
Winston & Strawn LLP
200 Park Avenue
New York, NY 10166-4193
Telephone: (212) 294-4616
Facsimile: (212) 294-4700
Email: DGreenspan@winston.com
Email: JAmoona@winston.com

/s/ Thomas D. Warren
Thomas D. Warren
Baker & Hostetler LLP
Key Tower
127 Public Square, Suite 2000
Cleveland, OH 44114-1214
Telephone: 216.621.0200
Facsimile: 216.696.0740
Email: twarren@bakerlaw.com

Attorneys for Defendant/Respondent
National Football League Players Association

CERTIFICATE OF SERVICE

I hereby certify that on November 30, 2016, a copy of foregoing was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. All other parties will be served by regular U.S. mail. Parties may access this filing through the Court's system.

/s/ Thomas D. Warren
Thomas D. Warren
Email: twarren@bakerlaw.com
BAKER & HOSTETLER LLP
Key Tower
127 Public Square, Suite 2000
Cleveland, OH 44114-1214
Telephone: 216.621.0200
Facsimile: 216.696.0740
Attorneys for Defendant/Respondent
National Football League Players
Association